

OBJAComO

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
3 -----x

4 UNITED STATES OF AMERICA,

5 v.

24 Cr. 542 (AS)

6 SEAN COMBS,

7 a/k/a "Puff Daddy,"
8 a/k/a "P. Diddy,"
9 a/k/a "Diddy,"
a/k/a "PD,"
a/k/a "Love,"

Defendant.

Oral Argument

10 -----x
11 New York, N.Y.
12 November 19, 2024
13 3:00 p.m.

14 Before:

15 HON. ARUN SUBRAMANIAN,

District Judge

16 APPEARANCES

17 DAMIAN WILLIAMS

18 United States Attorney for the
Southern District of New York

19 BY: CHRISTY SLAVIK

MEREDITH FOSTER

MITZI STEINER

MADISON SMYSER

20 Assistant United States Attorneys

21 AGNIFILO INTRATER LLP

22 Attorneys for Defendant

23 BY: MARC AGNIFILO

TENY GERAGIS

24 LAW OFFICE OF ANTHONY L. RICCO

25 Attorney for Defendant

BY: TONY RICCO

OBJACoM0

1 Appearances (Continued)

2 SHAPIRO ARATO BACH LLP
3 Attorneys for Defendant
BY: ALEXANDRA SHAPIRO

4 SHER TREMONTE, LLP
5 Attorneys for Defendant
BY: ANNA ESTEVAO

OBJACoM0

1 (Case called)

2 THE DEPUTY CLERK: Can counsel starting with counsel
3 for the government please state their appearance for the
4 record.

5 MS. SLAVIK: Good afternoon, your Honor. Christy
6 Slavik, Meredith Foster, Mitzi Steiner, and Madison Smyser for
7 the United States.

8 THE COURT: Good afternoon. And for the defense?

9 MR. AGNIFILO: Yes. Good afternoon, your Honor. You
10 have Marc Agnifilo, you have Teny Geragos, you have our client,
11 you have Tony Ricco, and you have Anna Estevao, and I expect
12 any moment we'll have Alexandra Shapiro who is coming from the
13 Second Circuit. And Sean Love Combs is with us today as well.

14 THE COURT: Good afternoon, Mr. Combs. And good
15 afternoon to all of you. And that's fine for Ms. Shapiro when
16 she arrives to join you at counsel table.

17 MR. AGNIFILO: Thank you, your Honor.

18 THE COURT: Mr. Agnifilo, and am I pronouncing that
19 correctly?

20 MR. AGNIFILO: That's perfect. Perfect.

21 THE COURT: Okay. Mr. Agnifilo.

22 MR. AGNIFILO: Yes.

23 THE COURT: I received the application and the
24 response from the government and your reply letter. So let me
25 ask one question at the outset, and then I'll allow you to say

OBJAComO

1 anything additionally you would like to in support of your
2 application.

3 Ultimately, what is it that you are seeking here in
4 terms of relief?

5 MR. AGNIFILO: It's a good question, your Honor. And
6 we're seeking relief in stages. I think at this point what we
7 need is we need more fact finding. So in the first instance,
8 we are going to want to know more about how it came to be that
9 Mr. Combs's personal papers and his notes of meetings with his
10 lawyers came into the trial team's possession. And the reason
11 that's important is because the government has a version of how
12 that happened that is very much at odds with our version of how
13 that happened. And the reason it's significant is because it
14 impacts, in my view, on the magnitude of the Constitutional
15 violation.

16 There are a few different violations that we think are
17 in the mix, and let me break them down, at least from my view,
18 at this point. Your Honor, might have an additional view.

19 There's what we contend is a Fourth Amendment
20 violation, because this was not a jail orchestrated search for
21 the purposes of preserving order and safety in the jail.

22 So we contend that under the Second Circuit decision
23 the 1986 case of *United States v. Cohen*, this is not a jail
24 search. This is a search where the Second Circuit has held
25 that Mr. Combs has an expectation of privacy in his personal

OBJAComO

1 effects, certainly in his legal notes. So there's a Fourth
2 Amendment issue.

3 THE COURT: So let me stop you there.

4 MR. AGNIFILO: Yes, Judge.

5 THE COURT: You'll agree that this occurred during a
6 BOP general sweep of the facility, right?

7 MR. AGNIFILO: It occurred while that was also
8 occurring, yes.

9 THE COURT: So you're saying it was a pretext?

10 MR. AGNIFILO: That is what I'm saying, correct. Yes.

11 THE COURT: All right. Continue.

12 MR. AGNIFILO: Yes. So there's the Fourth Amendment
13 component to it because we believe it was a pretext. There's
14 an attorney/client privilege issue because Mr. Combs's notes
15 were taken, were photographed I should say, were photographed
16 and returned. Some number of those notes were given to a
17 taint, team and then appears 19 pages of those notes were given
18 from the taint team to the prosecution team and that's what we
19 have now.

20 So there's an attorney/client privilege violation
21 because the prosecution team has 19 pages of his notes. Or I
22 should be more specific, it's 11 pages of his notes, and then I
23 think it's 8 pages of a calendar book, and I think the two
24 stand on different footing.

25 The thing that we don't know yet -- and my contention

OBJACoM0

1 is we know enough now to find an attorney/client privilege
2 violation and a Fourth Amendment violation. What we don't know
3 yet is what really -- what led up to this. How is it that
4 there were so many, if we look at it through the government's
5 lens even, failures that led to the prosecution team having
6 these 19 pages of material?

7 And there's a couple of things we don't yet know.
8 One, we haven't been able to test the government's proffered
9 explanation and we need certain things to do that. Some of
10 those things is I think we need the surveillance video. I
11 think we need the surveillance video of the search. The
12 surveillance video of the search will tell us exactly who
13 conducted the search, what they looked at, how long they were
14 doing it, and we can see exactly how the search took place
15 because there might be a surveillance video.

16 The other part that we don't have yet is
17 communications between the U.S. Attorney's Office and the
18 person dubbed as Investigator 1 or anybody else who might have
19 been involved in the search of Mr. Comb's legal notes. That's
20 important under -- it's important under the Fourth Amendment
21 analysis to see what, if any, role the U.S. Attorney's Office
22 played in conveying what photographs, what they should
23 photograph, what they shouldn't photograph, why it was that
24 this institutional search that was for weapons and drugs and
25 contraband, illegal cell phones and the like, that was not

OBJACoM0

1 what -- and these are Mr. Combs's legal files.

2 There's no reason to search these legal files for cell
3 phones or weapons or drugs. And if you don't find cell phones
4 or weapons or drugs in there, one is to put them back if one is
5 really acting within the scope of my understanding of what this
6 multiagency MDC sweep was all about.

7 So it is our contention, as your Honor eluded to, that
8 the aspect of the search that impacted Mr. Combs and resulted
9 in his legal papers being given to the prosecutors was all a
10 pretext.

11 And I'll get to -- there's more I have to say about
12 this, but your Honor asked me a direct question.

13 THE COURT: I'm trying to figure out the logistics and
14 then I'm going to come back to what relief you're ultimately
15 seeking, but let's keep it on the logistics.

16 MR. AGNIFILO: Sounds good.

17 So in the first instance, I think we need more fact
18 finding. We don't know enough. We don't know the role the
19 U.S. Attorney's Office played. We don't know exactly what
20 Investigator 1 was doing. We're not completely sure that
21 Investigator 1 was the one who conducted the search. The facts
22 that have been proffered by the government are at odds with
23 some of the facts that we understand in terms of who
24 interviewed Mr. Combs and then who went about going to the area
25 where his legal papers were.

OBJAComO

1 The surveillance will give us answers to some of these
2 questions, as will the communications between the government
3 and Investigator 1 or whoever was conducting the search.

4 Once we know that, then it may be that we have
5 something amounting to an outrageous government conduct
6 transgression under the Fifth Amendment. I can't tell the
7 Court that we have that at this moment because I don't know
8 enough. We might have a form of Sixth Amendment violation of a
9 purposeful infringement of a pretrial detainee, attorney/client
10 privilege, especially when it relates to trial strategy and
11 investigation strategy.

12 So in the first instance, we're asking for further
13 fact finding so that we know enough to come to your Honor and
14 say this is a principled remedy. Now, it could be dismissal of
15 the indictment. It could be recusal of the prosecution team.
16 But we don't know enough to say which is a reasonable, measured
17 remedy given the facts because we don't yet know all the facts.

18 THE COURT: Okay. And I understand that this was
19 brought up as an emergency application principally because two
20 excerpts from these documents were used in connection with the
21 government's response to the renewed bail application, correct?

22 MR. AGNIFILO: That is correct, Judge.

23 THE COURT: So the relief you are seeking along those
24 lines would be for me to not consider those, right?

25 MR. AGNIFILO: So I think in the first instance, to

OBJAComO

1 the extent that the trial team is in possession of Mr. Combs's
2 notes, I think we have to make it so they're no longer in the
3 possession of those notes. They could give them to us. They
4 could give them to the Court. I don't really care what they do
5 with them, but in order to protect the sanctity of the
6 attorney/client privilege, I think I have an obligation to ask
7 the Court to remove those materials from the trial team.

8 Now, in terms of the materials held by the taint team,
9 we don't know yet what materials are held by the taint team.
10 We've just never been told that. We've been told these 19
11 pages went over to the trial team. We don't know what the
12 taint team has. So as a preliminary issue, we would like to
13 know what if any additional material is held by the taint team,
14 what if any other material is in the United States Attorney's
15 Office in the Southern District anywhere, and we want all of
16 that material back while this is pending. And the reason I
17 make that request is because we cannot put ourselves in a
18 situation of having waived Mr. Combs's attorney/client
19 privilege.

20 So we have to be as direct, and the word that comes to
21 mind is aggressive, but I don't really mean aggressive. We
22 have to be direct right off the bat and say no one should have
23 any of this material other than Mr. Combs.

24 So in the short term, and what the emergent aspect is,
25 is that part of it, your Honor.

OBJAComO

1 THE COURT: Okay. Understood.

2 Ms. Slavik, are you going to be speaking on behalf of
3 the government?

4 MS. SLAVIK: I will, your Honor.

5 THE COURT: All right. So, first, maybe you can just
6 fill me in on what happened here exactly.

7 MS. SLAVIK: Yes.

8 THE COURT: So I understand that there was this Bureau
9 of Prisons sweep. Now, were there any communications prior to
10 that sweep between anyone on the prosecution team and this
11 investigator who photographed the notebook?

12 MS. SLAVIK: No, your Honor. As you note, the notes
13 at issue, which are, excuse me, the 19 pages, which are 17
14 separate documents, the 19 pages include two duplicates, those
15 were recovered during a preplanned sweep of the MDC.

16 Now, the purpose of this sweep, and this is widely
17 reported in the press, the purpose of this sweep was to address
18 some of the issues that have persistently come up at the MDC.

19 THE COURT: No. I understand that. But I think what
20 Mr. Agnifilo is saying is why were they taking photos of
21 Mr. Combs's notebook.

22 MS. SLAVIK: Yes. To be clear, your Honor, no members
23 of the prosecution team had any communication with the BOP
24 investigator who was part of this MDC sweep.

25 THE COURT: Now, that being said, the investigator,

OBJAComO

1 the same one who photographed the notebook, was the person who
2 was also monitoring Mr. Combs's communications in and out of
3 the facility, right.

4 MS. SLAVIK: That's right, your Honor.

5 THE COURT: So he was focused on Mr. Combs in an
6 investigatory capacity, fair?

7 MS. SLAVIK: In his capacity as a BOP investigator,
8 yes, your Honor. His task -- he was tasked, as I understand
9 it, with reviewing the defendant's communications, that
10 includes the defendant's calls and that includes the
11 defendant's e-mails.

12 THE COURT: Okay. So let's say that he thought of
13 himself as an agent of the prosecution team, whether that's
14 true or not, or whether that's how you saw it or not, and when
15 he saw that there was this sweep and that he would have access
16 to the cell and the locker and all of Mr. Combs's documents, he
17 took it upon himself to, in his mind, aid the investigation
18 effort by photographing these pages.

19 Would that, at least arguably, be a Fourth Amendment
20 violation?

21 MS. SLAVIK: Your Honor, I don't think we can make
22 that logical leap. And I say that because the BOP investigator
23 works for the BOP. He has his own reasons for monitoring the
24 defendant's communications. Those reasons include the safety
25 of the institution. Those reasons include making sure that the

OBJAComO

1 defendant is in compliance with the BOP rules and regulations,
2 which I note he was not. So the BOP has its own reasons for
3 investigating the defendant's misconduct.

4 Now, it is true that the BOP has turned over
5 materials. Those include calls, e-mails, and these photographs
6 of notes to the U.S. Attorney's Office. But that was in
7 response to grand jury subpoenas and document requests. That
8 was not turned over in conjunction with some sort of shared
9 investigatory purpose, if that makes sense, your Honor.

10 THE COURT: Okay.

11 MS. SLAVIK: And to be clear, the BOP investigator who
12 was tasked with reviewing the defendant's phone calls and
13 e-mails, he was at the MDC sweep. However, none of the members
14 of the prosecution team were aware of that in advance. And
15 none of the members of the prosecution team provided any sort
16 of direction or instruction to the BOP investigator to do
17 anything with respect to the defendant's personal belongings or
18 personal space, nothing of the sort.

19 THE COURT: So when is the first time that the
20 prosecution team became aware that photographs had been taken
21 of Mr. Combs's notes.

22 MS. SLAVIK: That was after the conclusion of the MDC
23 sweep.

24 THE COURT: But before the grand jury subpoena had
25 issued?

OBJAComO

1 MS. SLAVIK: Correct.

2 THE COURT: Okay. So you knew that there were these
3 documents and then you issued and then you pointed --

4 MS. SLAVIK: That's right. And then the government
5 requested receipt of those documents.

6 THE COURT: Okay.

7 MS. SLAVIK: And I think, your Honor -- I'm happy to
8 talk more about the circumstances of the BOP investigator
9 recovering these notes, but I do think that it's important to
10 note how the government treated these notes once the notes were
11 in the government's possession.

12 THE COURT: But maybe this is related to that. Are
13 these the only notes?

14 MS. SLAVIK: Yes, your Honor. This is the entirety of
15 the notes. And just to --

16 THE COURT: So just to be very clear.

17 MS. SLAVIK: Yes.

18 THE COURT: Because Mr. Agnifilo raised this as an
19 issue for discovery, but maybe we can short circuit that,
20 there's nothing else from the search?

21 MS. SLAVIK: So let me be clear, and I think I should
22 clarify something that Mr. Agnifilo said. I think he said that
23 defense team did not know what material was held by the taint
24 team. I just want to correct that slightly.

25 The government made a production last night to defense

OBJAComO

1 counsel that's comprised of all the materials in the possession
2 of the taint team, that includes calls, e-mails, and the
3 entirety of the universe of notes.

4 That's separate from what the government attached to
5 its letter yesterday. That's Exhibit A. Those 19 pages
6 contain redactions, as the Court probably noticed. Those are
7 the notes that were put over the privilege wall. In other
8 words, those are the notes that were reviewed by the filter
9 team and then passed to the case team.

10 So I have not seen the production that was made
11 yesterday because those materials were in possession of the
12 filter team. That production was made entirely through the
13 filter team.

14 THE COURT: So why wasn't that done with respect to
15 these 19 pages? I mean, this is getting to just a practical
16 question, which is wouldn't the best course be for documents
17 under these circumstances, if there's even a question of
18 potential privilege, because these were legal pads stacked
19 under a manila envelope -- manila folder that said legal. To
20 just handle it in the way of: Filter team gets it, turns it
21 over to the defense for their review so they can mark it as
22 privileged, log it, you can challenge it under the
23 circumstances. Why wouldn't that be the best way?

24 MS. SLAVIK: So, your Honor, I think there's an
25 important point here, which is that these materials were

OBJAComO

1 obtained by the government in connection with the government's
2 ongoing grand jury investigation.

3 The government has been very clear on the record at
4 multiple appearances that this investigation is very much
5 ongoing. And the government's investigation into the
6 defendant's continued obstruction was ongoing. And so, you
7 know, these materials were obtained pursuant to the
8 government's ongoing covert grand jury investigation.

9 THE COURT: On the covert point.

10 MS. SLAVIK: Yes.

11 THE COURT: Just maybe you can help me out with this.
12 Is it BOP procedure when documents are taken from an
13 individual's cell to not take those documents, but rather to
14 photograph them and then retain those photographs?

15 MS. SLAVIK: I'm sorry, your Honor?

16 THE COURT: Is it the usual course when a search is
17 conducted in a BOP facility to photograph those documents as
18 opposed to taking them? Because I think what the defense is
19 saying is, if you had just taken the notebook, we would have
20 known it was gone and then we would have challenged the taking
21 of the notebook, and then maybe they would have gotten it back
22 before the government used it offensively in a court pleading.
23 I think that's what they're saying, but I haven't heard your
24 response.

25 MS. SLAVIK: I don't know the answer to that, your

OBJAComO

Honor. What I would stress, though, is that the government received these materials in the normal course. Once we were alerted to their presence, the existence of these photographs, of the notes, the government requested the notes in connection with its ongoing covert grand jury investigation, which, you know, I don't think there's any obligation for the defense -- or excuse me, for the government to notify defense counsel of its investigation into the defendant's ongoing criminal conduct.

And just one thing I just I do want to clarify for the record, I think I might have misspoke earlier. The government had previously spoken with the BOP investigator in connection with the calls and e-mails. I think I had, when I said the government had never spoken to him, what I meant was in the context of the MDC sweep.

THE COURT: That's what I understood your answer to be.

MS. SLAVIK: Okay. Thank you for that point.

Anyway, your Honor, I think the government received these materials in a completely appropriate channel, and what the government did then with the materials was also completely appropriate by sending them to the filter team.

Whenever we get new information, whether that is through a subpoena return, or a search warrant return, something provided by a witness, anything like that, if there's

OBJAComO

1 reason to believe that those documents may contain privileged
2 information, the material first goes to the filter team. That
3 is the practice of the U.S. Attorney's Office. That is the
4 practice of this particular case team. And here, because the
5 defendant has used monitored jail calls and unauthorized
6 third-party messaging systems to communicate with his
7 attorneys, the government took measures to ensure that its
8 review of the defendant's materials would respect his potential
9 privilege.

10 THE COURT: So let's say that these notes were
11 verbatim notes of meetings that Mr. Combs had with his
12 attorneys, how would you be able to figure out if the notes
13 were privileged or not without asking the defendants? I mean,
14 just explain to me how you would do that?

15 MS. SLAVIK: So, your Honor, I think the filter team's
16 job is to do the best they can to make privileged
17 determinations with what they have. And I will note for the
18 Court that this filter process that I've been describing, that
19 has been sanctioned and blessed by many district courts here in
20 the Southern District.

21 THE COURT: Who is the filter team? I don't need
22 names, but are these other attorneys in the U.S. Attorney's
23 Office?

24 MS. SLAVIK: Exactly, your Honor. The filter team is
25 led by an Assistant United States Attorney in the office and

OBJAComO

1 there's a filter team that is completely separate from the case
2 team.

3 THE COURT: And am I correct that in terms of
4 discovery in this case, to the extent that there are privilege
5 issues that come up, the practice has been for the filter team
6 to work with defense counsel to make the privilege calls so
7 that documents that are privileged can be filtered out.

8 MS. SLAVIK: So yes and no, your Honor. No in that
9 for a long time, this investigation was covert. We had a lot
10 of information before charges were brought and the filter team
11 was responsible for reviewing potentially privileged
12 information and making privileged determinations with respect
13 to that information. Those filter decisions were done without
14 the input of defense counsel of course because the
15 investigation was covert.

16 Since the defendant has been charged, yes. The filter
17 team has provided information, potentially privileged
18 information, to defense counsel, and there's been, as I
19 understand it, I'm not part of the dialogue, but as I
20 understand it, there's a dialogue between the filter team and
21 defense counsel with respect to potentially privileged
22 material. However --

23 THE COURT: Okay. I think you're going to give me the
24 however.

25 MS. SLAVIK: I want to make that distinction between

OBJAComO

1 covert and overt. And in this context, this BOP material that
2 was part of the government's covert grand jury investigation
3 into the defendant's ongoing criminal conduct.

4 Now, of course, the government made this public when
5 the defendant --

6 THE COURT: I don't understand that dividing line
7 given that the defendant has been charged. Maybe you can help
8 me out with it because especially under the circumstances where
9 the thing that happens after the government receives these
10 documents is the use by the government of those documents in
11 response to a bail application in this case. And so it's --
12 maybe you can help me understand the dividing line between what
13 you're describing as a covert investigation and discovery in
14 this case. Because the grand jury proceeding is what
15 ultimately triggered this case. And so while I understand that
16 the two may be proceeding in parallel, there's some blurred
17 lines between the two, right?

18 MS. SLAVIK: Well, I mean, it's certainly true that
19 the defendant has been charged, and so that part of the grand
20 jury investigation is now overt. However, as stated multiple
21 times on the record, the government's grand jury investigation
22 continued into criminal conduct that was separate and apart
23 from what's already been charged.

24 THE COURT: Well, let me ask it a different way: Is
25 there any other situation, other than this one, where documents

OBJAComO

were taken from the defendant while he was in detention where this kind of issue would come up? Because any time you would seek documents from Mr. Combs, he would obviously know about it because you were subpoenaing documents from him or something else and so they would know about it. And then you could engage in these filtering protocols that you described working with defense counsel, etc.

It's only because of the particular nature of this search that Mr. Combs was not aware apparently at the time that his notebooks had been photographed. Fair?

MS. SLAVIK: I'm not sure that that is fair. I think that the government has multiple ways to access and obtain information in connection with a grand jury investigation, including many ways that are not obvious or overt to the defendant. And when the government is investigating that continuing criminal conduct, I don't think there's any obligation for the government to alert defense counsel that it is investigating ongoing criminal activity.

I certainly -- defense counsel has not provided any sort of authority for that sort of proposition. And I'm not aware of any either.

THE COURT: Okay. Turning to privilege, are any of these documents privileged in the government's view and do you have a case that you can share with me? And if you don't have it now, that's okay, I'll give you some time to find it.

OBJAComO

1 MS. SLAVIK: Yeah.

2 THE COURT: But given what you've heard from defense
3 counsel, and I don't want to get too deep into the documents or
4 the explanation because I think some of this is under seal, but
5 is the government's position that these are just absolutely not
6 privileged?

7 MS. SLAVIK: No, your Honor, not necessarily.

8 So I think, as I mentioned, the filter team's job is
9 to do the best they can in terms of making privileged
10 determinations with the information that they have. And let me
11 just kind of run through what information they had with respect
12 to the notes, these 19 pages.

13 First, the notes were from a notebook that was labeled
14 "things to do." They were not labeled legal. They were not
15 labeled attorney/client privilege.

16 Defense has suggested that the notebooks and the loose
17 papers were meant to be in the manila folder labeled legal.
18 First of all, you know, assuming that proximity to a folder
19 labeled legal, means those papers should be considered "legal"
20 I think there's good authority in this district that suggests
21 that self-labeling something as attorney/client privilege or as
22 legal does not automatically make the documents attorney/client
23 privileged or legal.

24 So I think that's one important point.

25 THE COURT: Well, I think the response is that if you

OBJAComO

1 have a folder like this you really can't jam a bunch of legal
2 pads in it. And the defense tried to have the facility give
3 Mr. Combs a Redweld where he could have put all the documents
4 inside. It's just that they didn't allow him to do that. And
5 so he had the legal manila folder and it was sort of on top of
6 the legal pads, but I understand.

7 MS. SLAVIK: Your Honor, we're talking about, you
8 know, 11 pages of what the defense has argued is privileged.
9 And, like I said, the label on the notebook is things to do.

10 So that's one thing. The notes also, on their face,
11 I'm not sure if your Honor has gone through them, but the notes
12 on their face do not obviously memorialize conversations with
13 attorneys. The defendant has characterized them as notes to
14 and with his attorneys, but I don't think that that is clear
15 from the face of the notes.

16 Rather, these notes are pretty wide ranging. They
17 include action items from non-attorneys, like family members
18 and like financial advisors. Those would not be privileged.
19 They include notes about family matters, family members'
20 birthdays; that's not privileged. They include inspirational
21 quotes; those aren't privileged.

22 So much of the content of these 11 pages of notes
23 actually have nothing to do with this case at all. And so the
24 filter team made determinations based on the information that
25 they had and the context that they had, which includes, you

OBJAComO

1 know, what I just described.

2 Now, those determinations don't have to be perfect.

3 In fact, the law in this space contemplates that mistakes could
4 be made. And I would point the Court towards the *Lumiere*
5 decision by Judge Rakoff.

6 So, you know, the government is happy to engage with
7 defense counsel if they think that, as they clearly do, that
8 some of these materials are privileged, but --

9 THE COURT: For present purposes, the defense argues
10 that at the very least, that excerpts from the notes that are
11 contained in the government's opposition brief are privileged.

12 So let's say I accept everything that you're saying.

13 The filter worked as best it could. There's no bad faith
14 involved. But you look at the explanations and everyone sort
15 of agrees that those excerpts are privileged, what happens then
16 with respect to the usage of those excerpts?

17 MS. SLAVIK: Well, so first of all, I disagree that
18 the two excerpts used in the government's opposition brief are
19 privileged, and I'm happy to get into why I think that.

20 THE COURT: We'll get into that next, but let's
21 assume, I just want to understand how this works.

22 MS. SLAVIK: Yes, so assuming, of course noting my
23 disagreement with your conclusion.

24 THE COURT: Yes.

25 MS. SLAVIK: That these notes would be privileged, the

OBJAComO

1 remedy would simply be to suppress the government's use of
2 those notes. It wouldn't be to suppress the notes wholesale.
3 It would just be to excise the privileged aspects of the notes.

4 THE COURT: Okay. Understood.

5 As a matter of just strategy or just kind of to avoid
6 the time and resources involved in further examination of those
7 two excerpts, would the government simply say we believe we
8 have a strong opposition, we don't need to rely on these two
9 excerpts, so we will just not rely on them and the Court need
10 not consider them?

11 MS. SLAVIK: Your Honor, I think that's right. I
12 think that the government's brief --

13 THE COURT: I mean, are you willing to take that
14 position? Meaning that, look, this issue has been raised.
15 Rather than get deep into it when we have these other issues
16 and a lot of other things happening, the Court simply need not
17 consider those two excerpts in considering the government's
18 opposition to the bail application?

19 MS. SLAVIK: I think that's right, your Honor. I
20 think for the purposes of the bail hearing that's scheduled for
21 Friday, the government's position is that the Court need not
22 consider the two excerpted notes. The government's opposition,
23 as your Honor is well aware, sets forth multiple examples of
24 the defendant's continued obstruction and interference with the
25 integrity of these proceedings. There's no need for the

OBJAComO

1 government to rely on these two examples.

2 THE COURT: Okay. So then next question: If you're
3 not relying on them for that purpose, is there any issue in
4 terms of giving those documents back? Or putting them in a
5 vault and saying pending further investigation, if there is
6 going to be an investigation, we don't need to rely on these.
7 Because you point out a lot of what's in the notes are things
8 like inspirational messages, things that have nothing to do
9 with this case. There are pages of phone numbers, okay. And
10 so it may be that you say, we'll put these into a vault or
11 we'll hand these back to defense counsel. And we will, if we
12 need to make an application at some later point in this case,
13 we'll do that. But for these purposes, we're giving the notes
14 back.

15 MS. SLAVIK: Your Honor, I think that these notes and
16 specifically the two excerpts in the government's bail
17 opposition, I think that they're related to the government's
18 ongoing investigation into the defendant's obstructive conduct.
19 And I think that they're evidence of the defendant's criminal
20 conduct. So I would shy away from the Court's suggestion that
21 we put them in a vault and lock them up.

22 You know, I think that the government's opposition
23 brief is -- there's no need to rely on those two examples. But
24 I think that the government would want to use those notes, the
25 two examples specifically, in connection with its ongoing

OBJAComO

1 investigation.

2 And primarily, you know, just as a matter of
3 procedure, I think that the defendant would have to make a
4 motion before to ask for that relief. That's not my
5 understanding of the relief that the defendant is asking for.

6 THE COURT: No, but you can always, to short circuit
7 any future application and having to deal with it, you can
8 agree that the Court or that the government would not consider
9 those documents pending a further application. I mean, that's
10 something you could do. So I'll ask you to consider that.

11 If you don't, for present purposes, I will understand
12 that the government plans to retain the documents and to use
13 them in its investigation unless the defendant makes an
14 application and it's successful. But if you change your mind,
15 just let everyone know because that could simplify things.

16 MS. SLAVIK: Understood, your Honor.

17 THE COURT: Now, in terms of whether the two excerpts
18 are privileged, which I wanted to be sure I gave you an
19 opportunity to get to, can you really say one way or the other
20 if you don't have the explanation from the defense on the
21 circumstances of those two excerpts?

22 MS. SLAVIK: I think we can, your Honor.

23 THE COURT: Okay.

24 MS. SLAVIK: And let me just, let me just explain why
25 I say that. So first, the two excerpts relate to the defendant

OBJAComO

1 paying a potential witness and the defendant "finding dirt" on
2 potential victims and witnesses.

3 So with respect to both of these notes, I think it's
4 pretty clear that these are not attorney/client privileged.
5 The attorney/client privilege obviously protects communications
6 between the defendant and his attorneys for the purpose of
7 obtaining or providing legal advice. I don't think that on
8 their face either of these notes are indicative of
9 communications to obtain legal advice.

10 So that brings us into work product territory, which
11 is certainly broader than the attorney/client privilege, but
12 it's not limitless.

13 Work product protection protects materials prepared by
14 or at the behest of counsel in anticipation of litigation, and
15 these materials don't fall under that category either.

16 So the focus of the work product privilege is really
17 opinion material. Attorney opinion material to protect the
18 attorney's mental processes so that the attorney can analyze
19 and provide legal advice and prepare a client's case.

20 The note about whether a witness was paid or not is
21 not opinion material and it's not mental processes. It's
22 really an administrative question that has nothing to do with
23 legal advice or strategy. And maybe, to put a finer point on
24 it, the information at issue is not protected. Following up
25 with a paralegal to determine whether a witness was paid off or

OBJAComO

1 not, that's not protected by a privilege.

2 THE COURT: You're saying paid off, but let me give
3 you an example. Let's say that a potential individual had
4 counsel that was being paid for in some capacity. And it was a
5 legal arrangement that was in place and so that was what was
6 being discussed, but those are the circumstances.

7 MS. SLAVIK: Sure. That fact of payment, not
8 privileged. And I would argue that to the extent this is about
9 the defendant paying off a witness, which is of course what the
10 government is arguing, that would not -- that would fall under
11 the crime fraud exception of any sort of privilege. Either
12 attorney/client privilege or work product.

13 THE COURT: Please proceed.

14 MS. SLAVIK: The next note about finding dirt on
15 potential victims and witnesses using a nonlawyer third party,
16 that's similarly unprotected under the work product doctrine.
17 And I think the context is particularly important here, and
18 I'll just refer the Court to the first page of Exhibit A, which
19 is where these notes are contained. The notes say: Find dirt
20 on two different victims, and then refers to a nonlawyer third
21 party. That individual is referred to in the government's
22 brief as Individual 2.

23 So these notes come from the defendant's "things to do
24 list" and many items in that notebook appear to be directed at
25 nonlawyer third parties. I've kind of described that, like

OBJAComO

notes for family members to follow up on things, notes for financial advisors, things like that.

THE COURT: You would agree that defense counsel, when defending any criminal case, may be investigating people who they believe will feature heavily in the government's case.

MS. SLAVIK: Of course, your Honor.

THE COURT: You have to do that. It's malpractice not to do that.

MS. SLAVIK: Of course, your Honor.

THE COURT: So what if, again --

MS. SLAVIK: The defense is entitled to that.

THE COURT: So --

MS. SLAVIK: I'm sorry.

THE COURT: I'm sorry. No, please.

MS. SLAVIK: Like I said, here context is really important.

THE COURT: That's just, I understand the context you're pointing to and I guess the response from the defense may be if this was Mr. Combs's vernacular describing what I was talking about, which is that the defense team's efforts to make sure that they were well prepared to defend against the government's case and people that they thought would feature potentially in the government's case, then under those circumstances, which you might have no reason to know about because you just have the document, you would agree under those

OBJAComO

1 circumstances. Closer call whether it falls into the category
2 of work product.

3 MS. SLAVIK: Sure. But here's why these notes don't.

4 First, the individual that is apparently, according to
5 the notes, tasked with finding this dirt is a nonlawyer.
6 Secondly, and this is noted in the government's brief, the
7 defendant had a call with a family member on October 14th, in
8 which he instructed the family member to work with this
9 nonlawyer individual to "find everything" on victim two. So I
10 think with those two pieces of context, I think it's clear that
11 this operation is outside the context of the defendant
12 defending this criminal case.

13 I think this is clear that the defendant is reaching
14 out to nonlawyer third parties and, by the way, Individual 2,
15 has never been identified by defense counsel as part of the
16 defense team. We have a long list of individuals who act in
17 the, you know, defense capacity. Individual 2 is not on that
18 list.

19 THE COURT: Okay.

20 MS. SLAVIK: So I think that's important context.

21 THE COURT: Okay. And now I think that we have
22 perhaps eliminated the emergent nature of this because the
23 excerpts aren't being relied on in the government in opposition
24 or to the bail application.

25 What is the government's position on turning over any

OBJAComO

1 communications between the government and investigator and the
2 surveillance video? Which I think were the two things that
3 Mr. Agnifilo mentioned. And is there any opposition to that?

4 MS. SLAVIK: Yes, your Honor, there is opposition to
5 that.

6 THE COURT: I figured.

7 MS. SLAVIK: These are pretty extraordinary measures
8 being sought by the defense. And at least by my perusal of the
9 defendant's letters filed yesterday and today, there's
10 absolutely no citation of any authority that supports the
11 defendant's request for this extraordinary relief. So the
12 government is very much opposed to those requests.

13 THE COURT: Well, I noticed that too. So why don't
14 we -- is there anything further from the government?

15 MS. SLAVIK: Not unless the Court has any additional
16 questions.

17 THE COURT: Mr. Agnifilo?

18 MR. AGNIFILO: Thank you, your Honor.

19 THE COURT: One question.

20 MR. AGNIFILO: Yes.

21 THE COURT: There was a declaration that the Court
22 received ex parte and under seal.

23 MR. AGNIFILO: Yes, Judge.

24 THE COURT: Given that the government is in possession
25 of the underlying documents, is there any reason why that

OBJAComO

1 declaration cannot be shared with the government, or some
2 version of it so that the government has the context to
3 determine whether there is actually a privilege that attaches
4 to some portion of these documents?

5 Because, as I understand, Ms. Slavik, they want to
6 work with you to try to resolve this. Now, you may disagree
7 with that, but at some level, usually when you get an ex parte
8 submission on a privilege application, it's because the other
9 side doesn't have the documents so you can't really share the
10 explanation with the other side without revealing the content
11 of the document. They have the documents, so it seems like it
12 might move things forward for you to share that declaration or
13 some version of it with the government.

14 MR. AGNIFILO: So my concern with doing that, your
15 Honor, is that we would be further giving the government
16 insight into defense strategies, the significance of certain
17 people who are mentioned in the notes, the significance of
18 different things in the notes.

19 So your Honor has asked me a direct question, so I
20 don't want to say no to you right off the bat. Let me talk to
21 my colleagues about it and see if there's something we can do.
22 But at the end of the day, we have an obligation to not
23 exacerbate the attorney/client.

24 THE COURT: I agree.

25 MR. AGNIFILO: Yeah.

OBJAComO

1 THE COURT: I agree. It's just a question of whether
2 the arguments you would make, and I'm going to give both sides
3 a little homework here on the privilege issue.

4 MR. AGNIFILO: Right.

5 THE COURT: So if your argument on privilege didn't go
6 to the importance of the material, but rather the
7 circumstances, these were notes that were taken in meetings
8 with counsel and pertain to legal strategy. At that level of
9 generality, I don't think it would raise any sort of
10 exacerbation concerns. So I think that that's just something
11 to consider.

12 MR. AGNIFILO: Yes, and we will consider it because
13 your Honor is asking us to consider it and we will.

14 THE COURT: Okay.

15 MR. AGNIFILO: So let me make two points.

16 I have brought the raw material. These are
17 Mr. Combs's legal papers.

18 As Investigator 1 said, what we see here in this first
19 folder it says "legal work." Some of these legal pads have --
20 say "legal."

21 THE COURT: Well, you mean some of the legal pads say
22 legal, not in connection with the fact that they are legal
23 pads; you are saying they are actually marked as "legal?"

24 MR. AGNIFILO: It's not a Staples legal pad. It's
25 actually handwritten the word. He's handwritten the word

OBJAComO

1 "legal."

2 THE COURT: Is that applied to the notebooks that
3 these documents were taken from?

4 MR. AGNIFILO: So there are no notebooks. There are
5 no notebooks.

6 THE COURT: Sorry, the legal pads that the photographs
7 were taken.

8 MR. AGNIFILO: Right. So these legal pads, we have a
9 folder that says "legal." On top of the legal pad he's
10 handwritten in blue handwriting the word "legal." All these
11 legal pads say "legal."

12 Now, part of the reason we need a hearing, and there
13 are many, many reasons we need a hearing, is what the
14 government is saying was searched is just not accurate.

15 THE COURT: Wait, let me just stop you for a second.

16 MR. AGNIFILO: Yes.

17 THE COURT: You saying the photographs that were
18 taken, those pages were in legal pads that are marked as legal?

19 MR. AGNIFILO: Yes. Yes. They're marked as legal.
20 They're marked as legal.

21 THE COURT: Do you have an example I can take a look
22 at right here?

23 MR. AGNIFILO: One second, Judge.

24 Okay. I will give your Honor this -- I'll do it any
25 way your Honor wants.

OBJAComO

1 THE COURT: I just want to see what you're talking
2 about.

3 MR. AGNIFILO: One second.

4 All right. What I'm going to do, with your Honor's
5 permission, I can give you the legal pad. And what I've done
6 is I've premarked where one of the pages. I'll give this to
7 your Honor.

8 And this was in a folder marked legal.

9 THE COURT: Okay. Mr. Hernandez, you can hand this
10 back.

11 THE DEPUTY CLERK: Yes.

12 MR. AGNIFILO: Thank you.

13 So one of the very significant things about these
14 notes is whenever one of Mr. Combs's lawyers goes to the jail
15 to speak to him, he walks out sometimes with all of these notes
16 in his hand, and sometimes with some subset of maybe one or two
17 folders of notes in his hand. And two things then happen.
18 One, he sits down with his lawyer and he says who wants to go
19 through the list first. Sometimes I'll have things I want to
20 say Ms. Geragos will do the same. Sometimes Mr. Combs has
21 things in his list. So every single thing, virtually every
22 single thing in these legal pads are things that he discusses
23 with his lawyers.

24 Now, sometimes they are matters of trial strategy.
25 Sometimes they're matters of what witnesses to interview.

OBJAComO

1 Sometimes they're matters of there's a certain person who knows
2 this potential witness, you should speak to that person about
3 what that third person nonlawyer might know about that
4 potential witness that could possibly undermine that witness's
5 credibility.

6 All of these things are discussed. We spend an
7 inordinate amount of time with Mr. Combs, speaking with him
8 about his legal case, every aspect of his legal case. And the
9 reason that is so, is because this is a sweeping racketeering
10 case. This racketeering case spans a long amount of time and a
11 great amount of conduct. This is not a case that relates to
12 say a single bank robbery that took place one day.

13 So we are studying this man's life. That's what we
14 do. Day in and day out. We do that for trial preparation. We
15 do that for the bail hearing. We are constantly talking about
16 things that he's done, charities that he's involved in. We're
17 talking about -- the government's talking about, well,
18 sometimes it's about financial advisors. Well, sometimes
19 that's related to bail. Sometimes that's related to how are we
20 going to show the judge what his assets are, how are we going
21 to show the judge what the house is worth.

22 This is not a single day, a single event case. This
23 is an indictment of this man's entire life. So we spend, his
24 lawyers spend, a tremendous amount of time covering every
25 conceivable nook and cranny of this man's life. And I do have

OBJACoM0

a case for the Court. And the case is called *United States v. Defonte*, D-E-F-O-N-T-E. It's at 441 F.3d, 92. It's from the Second Circuit from 2006. Very important case. In my view, dispositive of these issues. What the Second Circuit said in *Defonte*, is that when it comes to an inmate, and that inmate's notes, there are two types of notes that are 100 percent privileged. The first type is anything that is discussed with the lawyer. Everything in these notes is discussed with the lawyer. He comes out, Mr. Combs comes out, and he reads us his to-do list. That could be related to any one of a number of things.

If it's in this legal file, it is discussed with his lawyer. The *Defonte* decision makes clear as a bell that when that happens, that is privileged. The other thing that's privileged, not surprisingly, is whenever a lawyer says something to a client and the client writes it down, that happens in here, too.

One of the things that your Honor will see in the 19 pages that the trial prosecutors have, is that they're the names of Mr. Combs's defense lawyers in those materials. Including different things that those defense lawyers have said to him. I'm not going to say them out loud because we have them in the declaration. But there's a point where one of the lawyers here at the defense table has an idea about a potential expert witness, who is a doctor, and who is retired. And he

OBJAComO

tells that to Mr. Combs. And Mr. Combs writes it down, and it's in Mr. Combs's notes that the trial prosecution now has. I cannot think of anything more in the heartland of attorney/client privileged material than a lawyer telling his incarcerated, waiting for trial client, here is the name of a potential witness, and the client thinks that's so important that he writes it down in his notes. The government has those notes. They have them, Judge.

They have notes related to who we have been tasked to call as potential witnesses. He gives us names. Sometimes it's first names. In the case of what the government has, it's first names. We know who they are because it's our job to call them. It's our job to call them and interview them. The government now knows potential defense witnesses for a May 5th trial. That's prejudicial. They shouldn't have it. It's heartland attorney/client privileged material that is now giving them an insight into the defense and they should not have it. And for them to get up here in front of your Honor and say we're right to have it, we don't want to give it back, we want to keep it and we even want to use it. That is the problem. That's the problem.

This has been a complete -- in the best of all circumstances, if we take intentionality and malice out of the equation, which I'm willing to do just for the sake of argument, this has been a complete institutional failure. The

OBJAComO

1 government says we want to work with defense counsel. You know
2 when the time to work with defense counsel was? The time to
3 work with us was when they got some of these notes. They have
4 our phone number. They could have called us on the phone.
5 Hey, Marc, hey, Teny, can we run these things by you, that
6 crazy BOP search, we got all this stuff, can we tell you what
7 it is so you can tell us what it's all about.

8 The fact that they didn't do that is not something to
9 be glossed over, and I'm not suggesting your Honor is. Is not
10 something to be glossed over. That is the problem.

11 THE COURT: Well, would you agree that in the context
12 of the grand jury investigation, it's impossible for them to do
13 that? I mean, you are asking, as I understand your request is,
14 for purposes of this litigation, where the prosecution team
15 comes into possession of documents that they may use in this
16 case, those documents should be shared first with counsel for
17 the defense.

18 Is that fair?

19 MR. AGNIFILO: So that's fair. But what I'm seeing
20 the government do is something that is -- the best word for it
21 is dangerous. They seem to be saying that if there's a covert
22 investigation, somehow, they don't have to worry about the
23 attorney/client privilege. That is, that is nothing that I
24 have ever seen.

25 THE COURT: I don't think that that's what they're

OBJAComO

1 saying. They're saying that they use a filter team to filter
2 out potentially privileged documents and that's a practice
3 that's been accepted in this district for some time. And I
4 haven't seen any authority from your side indicating that
5 that's improper.

6 And, I mean, I'm going to give you a chance to provide
7 that authority because I'm looking at the *Defonte* case and it's
8 very helpful. It would have been nice to have that as part of
9 the papers that were submitted.

10 But let me, Ms. Slavik, are you familiar with this
11 case, the *Defonte* case?

12 MS. SLAVIK: I'm not, your Honor.

13 THE COURT: Okay. Let's do a few things.

14 MR. AGNIFILO: Your Honor, can I do one thing because
15 Ms. Geragos has much more to do with the filter team than I
16 have, and I think she has some insights that could be helpful
17 for some of the insights that your Honor is asking.

18 THE COURT: Okay.

19 MS. GERAGOS: Your Honor, just one point, I just want
20 to address notes and the covert -- their argument in terms of
21 the covert grand jury investigation. After a search warrant
22 was executed on Mr. Combs's hotel room, after he was arrested,
23 they gave us a property receipt which we asked for and then we
24 received, and there was a notebook that was recovered. We
25 asked immediately for that notebook to be sent to the filter

OBJAComO

team, which it was. And so that material was seized after the indictment pursuant to a search warrant that was done after this grand jury indictment that he's arrested for. And we received that in discovery two days ago pursuant to our filter protocol.

And I think it's important because it's just at odds with what the argument is right now, which is that if there's a covert grand jury investigation, particularly related to Mr. Combs's notes, then the filter team would not have to check that with us. The filter -- they had Mr. Combs's notes from after an indictment that he's here sitting in jail on and that was sent to filter team and is not in the hands of the trial team prosecutors right now. So I just want to -- I want your Honor to have that data point with respect to his notes and notes that they have seized after he was indicted.

THE COURT: Understood. And, Ms. Slavik, as I understand it -- well, maybe you can tell me. What is the reason why these notes were not turned over to the defendants when they were first obtained? Meaning that the filter team had looked at them, they had filtered out what was not privileged in their view, provided you the balance, and then at that point, why didn't you just kind of package everything and provide it to the defense consistent with the Rule 16 obligations?

MS. SLAVIK: Your Honor, like I said, these particular

OBJAComO

notes were obtained pursuant to the government's ongoing covert investigation. The materials, the notes that Ms. Geragos referred to previously, those were obtained pursuant to a search warrant in connection with the defendant's arrest. There was nothing covert about the seizure of those notes. This set of notes is very different.

And if I may, your Honor, just respond to a couple of the points that Mr. Agnifilo raised. We're talking here about 11 pages of notes. We're not talking about a stack of notebooks, a stack of papers. We're talking about 11 pages that the defense has argued are privileged. None of those notes were labeled legal. The Court has those notes as Exhibit A.

THE COURT: Well, the notes themselves are not labeled legal, but at least the example that I received, that page was in a legal pad and at the top of the legal pad it was marked as legal.

MS. SLAVIK: Well, first of all, I'll note that the defendant retained all those notebooks, so it's not clear when that legal label was affixed to the notebooks. But, secondly, and more importantly, there's no authority that stands for the proposition that materials can become privileged by the simple expedient of labeling them as such.

THE COURT: That's fair.

MS. SLAVIK: That's a quote.

OBJAComO

1 THE COURT: That's fair. And I think that the real
2 issue is not really -- is not primarily the labeling. It is
3 the context in which those notes were taken. And I'm going to
4 give you time to respond to it. But, you know, I think what
5 I'm going to do here -- so just to be clear, what the
6 prosecution team has are these 19 pages.

7 MS. SLAVIK: That's correct, your Honor.

8 THE COURT: Right. So pending further order of the
9 Court, I'm going to order the prosecution to delete any
10 versions of these notes that you may have. So get rid of them.
11 So the government should not be in possession of them. The
12 Court has a copy, and if there are originals that would be
13 separately useful from the versions submitted to the Court,
14 then those can be e-mailed to the Court for the Court's -- and
15 the Court will retain it in its possession. But the government
16 should get rid of all of those. So you won't have them.
17 However, the Court will have them.

18 And so we will figure out the privilege issue. And
19 let me ask, Mr. Agnifilo, given that we have a bail hearing
20 coming up Friday.

21 MR. AGNIFILO: Yes, your Honor.

22 THE COURT: But I think we have eliminated any urgency
23 in terms of that bail hearing given the representations from
24 counsel and the steps that I'm taking today, so and because I'm
25 sure counsel will be preparing for that and other things, in

OBJAComO

1 terms of running down the privilege and other issues, my sense
2 would be to have briefing occur over the next few weeks. I
3 don't think that there's a need to have everyone running around
4 in the next 24 to 48 hours trying to find cases either in
5 support or in opposition to some of the applications that have
6 been made. I'll also note that the letters that the Court has
7 received are a couple pages at most, and until this hearing
8 service, not entirely clear what relief the defense was
9 seeking.

10 Do you have any issue with that timeframe?

11 MR. AGNIFILO: Not at all, your Honor.

12 THE COURT: Okay. So what the Court will do, we'll
13 put in an order indicating kind of a sequence of briefing on
14 some of the issues that have been raised. You'll have an
15 opportunity to raise authorities in support of any Fourth
16 Amendment or privilege arguments that you would like to raise.
17 We have the *Defonte* case. You probably have other cases you
18 would like to rely on. You also have your request for certain
19 evidentiary relief in terms of the video and communications
20 between the government and the BOP investigator. And the
21 government will have its chance to respond to that before we
22 make any determination. But I don't think given these steps
23 that there's a real urgency of the kind that was possibly at
24 issue before the Court had this hearing.

25 Is that fair?

OBJAComO

1 MR. AGNIFILO: I think that's right. Your Honor dealt
2 with the most urgent issue, which was in advance of the bail
3 hearing for Friday, which I very much appreciate.

4 There's one other issue that I think is -- could also
5 be urgent, which is we don't know whether any of this
6 privileged material has been used in a grand jury presentation.

7 Now, I'm obviously not in a position to ask about that
8 because I understand it's a sealed matter. But I do want to
9 put the government on notice that if they're looking to seek an
10 indictment or superseding indictment, you know, based on
11 privileged material, we've put them on notice in open court on
12 that and they proceed at their peril.

13 THE COURT: Well, Ms. Slavik, is anything -- without,
14 I know you can't get into the details, but I mean, is anything
15 happening with respect to these notes in the immediate future?

16 MS. SLAVIK: Your Honor, I won't get into details, but
17 I hear the defense and I understand the request.

18 Just one point of clarification for the government.
19 The directive that the Court just provided about the case team
20 getting rid of these notes, my understanding is that that was
21 not a directive towards the filter team, just because, you
22 know, to the extent there's litigation about these notes, I
23 think someone will have to have them. And my understanding is
24 that the appropriate team within the U.S. Attorney's Office
25 would be the filter team.

OBJAComO

1 THE COURT: And my understanding is that the filter
2 team is not involved in either the grand jury investigation or
3 this litigation, correct?

4 MS. SLAVIK: That's correct, your Honor.

5 THE COURT: Okay. So I think that that's fine.

6 Mr. Agnifilo?

7 MR. AGNIFILO: One other thing, in so far as time is
8 passing and these law enforcement searches at the MDC were from
9 I think it was October 28th until November 1st, I would ask on
10 the record that the government ask, pending your Honor's
11 ruling, that any surveillance video be preserved.

12 THE COURT: Ms. Slavik, I assume there's no issues
13 there. Can you make that request to the Bureau of Prisons?

14 MS. SLAVIK: Yes, Judge.

15 THE COURT: Okay. Ms. Slavik, just one further
16 question for you or maybe one of your colleagues relating to
17 Friday's bail hearing, which is that the defense points to the
18 *Jefferies* case in the Eastern District. And what they say is,
19 look, just a month ago in the *Jefferies* case, the government
20 proposed a bail package in a case that at least, from their
21 perspective, mirrors this case in several dimensions. And
22 their point is that in that proceeding, the government asked
23 for a \$10 million bond and certain other restrictions, but they
24 agreed that there was a set of conditions that would reasonably
25 assure the appearance of the defendant. I don't know if danger

OBJAComO

1 to the community was at the forefront in that, at least the
2 government's presentation there, but they point to
3 circumstances of the alleged case there that are similar at
4 least to circumstances of the case here.

5 In the government's response to the bail application,
6 there wasn't much discussion or perhaps any to the *Jefferies*
7 case, so that's one of the things that I hope on Friday you
8 could inquire into, because obviously we have a prosecution
9 ongoing in the Eastern District of New York and a proposal that
10 was green lighted by the government there. So I wanted to just
11 make sure that there was a reason for any distinction in the
12 government's position in this case.

13 MS. SLAVIK: Yes, your Honor. The government's view
14 is that that case is very different from the case here and
15 we'll be prepared to address that in full at the hearing on
16 Friday.

17 THE COURT: Okay. And, Ms. Slavik, any further issues
18 that the government thinks we need to take care of here?

19 MS. SLAVIK: No, your Honor. Thank you.

20 THE COURT: All right. Thank you very much.

21 Mr. Agnifilo, any further issues?

22 MR. AGNIFILO: Yes, one last thing. I know our reply
23 on the bail issue is due tomorrow. Would your Honor be open to
24 maybe extending it for Thursday at noon since we've gotten a
25 little detained on this other issue? Or is that cutting it too

OBJAComO

1 close for your Honor?

2 THE COURT: No, that's fine.

3 MR. AGNIFILO: Okay.

4 THE COURT: So Thursday at noon.

5 MR. AGNIFILO: Thursday at noon. Let me just check
6 with my colleagues and make sure there's nothing else.

7 Thank you, your Honor. We have nothing else.

8 THE COURT: All right. Well, I appreciate everyone
9 coming in. We will see you all here on Friday. That will be
10 on the 26th floor on Friday. Thank you very much. We are
11 adjourned.

12 (Adjourned)

13

14

15

16

17

18

19

20

21

22

23

24

25